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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

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9 DAVID HOWELL,

10 Petitioner,

11 vs.

12 BILL DONAT, et al.,

13 Respondents.

Case No. 3:08-CV-00013-LRH-(RAM)

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**ORDER**

15 Before the Court are the Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254,  
16 Respondents' Motion to Dismiss (#16), Petitioner's Opposition (#23), and Respondents' Reply  
17 (#24). The Court finds that Petitioner has not exhausted his available state-court remedies for some  
18 grounds, and the Court grants the Motion (#16) in part.

19 Respondents first argue that two issues are not cognizable in federal court. In Ground 1,  
20 Petitioner claims that the trial court abused its discretion when it adjudicated him to be a habitual  
21 criminal pursuant to Nev. Rev. Stat. § 207.010. In Ground 2(2),<sup>1</sup> Petitioner claims that the trial  
22 court failed to make particularized findings of fact when it adjudicated him to be a habitual criminal.  
23 Respondents argue that these issues are not cognizable in federal habeas corpus. However,  
24 ultimately these are arguments on the merits of the issues, and it is unnecessary for the Court to  
25 determine these questions at this point because Petitioner must first decide what to do with his  
26 unexhausted grounds.

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28 <sup>1</sup>Respondents label this part of Ground 2 as Ground 2(b).

1        Respondents argue that Petitioner did not exhaust his available state-court remedies for all or  
 2 part of Grounds 2 through 6 and 7. Before a federal court may consider a petition for a writ of  
 3 habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C.  
 4 § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's  
 5 highest court, describing the operative facts and legal theory, and give that court the opportunity to  
 6 address and resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam);  
 7 Anderson v. Harless, 459 U.S. 4, 6 (1982).

8        “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state  
 9 remedies only if he characterized the claims he raised in state proceedings specifically as federal  
 10 claims. In short, the petitioner must have either referenced specific provisions of the federal  
 11 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.  
 12 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law  
 13 which applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d  
 14 1153, 1158 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal  
 15 error is insufficient to establish exhaustion. Moreover, general appeals to broad constitutional  
 16 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to  
 17 establish exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

18        Respondents argue that Petitioner did not exhaust Ground 2(2). The record shows that  
 19 Petitioner did not present this claim to the Nevada Supreme Court, either in his fast track statement  
 20 on direct appeal, see Ex. 83 (#20-9, p. 1),<sup>2</sup> or in his fast track statement on habeas corpus appeal, see  
 21 Ex. 85 (#20-9, p. 16). The Nevada Supreme Court did not consider this claim on its own motion.  
 22 See Ex. 40 (#20-1, p. 2), Ex. 80 (#20-8, p. 15). Ground 2(2) is unexhausted.

23        Ground 3 contains ten separate claims of ineffective assistance of trial counsel, and Ground  
 24 4 contains three separate claims of ineffective assistance of appellate counsel. Respondents  
 25 effectively argue that both grounds are completely unexhausted. Petitioner did not present these  
 26 claims to the Nevada Supreme Court in his fast track statement on habeas corpus appeal. See Ex.  
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28        <sup>2</sup>Page numbers in parentheses refer to the Court's computer images of the documents.

1 85 (#20-9, p. 16). The Nevada Supreme Court did not consider these claims on its own motion.  
 2 See Ex. 80 (#20-8, p. 15).<sup>3</sup> Grounds 3 and 4 are unexhausted.

3 Ground 5 is a collection of various claims, some involving ineffective assistance of counsel,  
 4 others concerning errors by the trial court or by the prosecution. Petitioner did not present these  
 5 claims to the Nevada Supreme Court, either in his fast track statement on direct appeal, see Ex. 83  
 6 (#20-9, p. 1),<sup>4</sup> or in his fast track statement on habeas corpus appeal, see Ex. 85 (#20-9, p. 16). The  
 7 Nevada Supreme Court did not consider this claims on its own motion. See Ex. 40 (#20-1, p. 2),  
 8 Ex. 80 (#20-8, p. 15). Ground 5 is unexhausted.

9 Ground 7 is a claim that appellate counsel was ineffective for not raising all of the issues that  
 10 should have been raised on direct appeal. Petitioner further argues that this Court should consider  
 11 all the issues that appellate counsel should have raised. Petitioner did not present this claim to the  
 12 Nevada Supreme Court in his fast track statement on habeas corpus appeal. See Ex. 85 (#20-9, p.  
 13 16). The Nevada Supreme Court did not consider this claim on its own motion. See Ex. 80 (#20-8,  
 14 p. 15). Ground 7 is unexhausted.

15 The Petition (#6) is mixed, containing both claims exhausted in state court and claims not  
 16 exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 521-22  
 17 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily dismiss  
 18 the unexhausted Grounds 2(2), 3, 4, 5, and 7, and proceed with the remaining grounds, he may  
 19 voluntarily dismiss this action without prejudice while he returns to state court to exhaust Grounds  
 20 2(2), 3, 4, 5, and 7, or he may move to stay this action while he returns to state court to exhaust  
 21 Grounds 2(2), 3, 4, 5, and 7. If Petitioner chooses the last option, he must show that he has “good  
 22 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no  
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 26 <sup>3</sup>The Court does not consider whether Petitioner presented these grounds on direct appeal  
 27 because claims of ineffective assistance of counsel must be raised in a habeas corpus petition.  
Gibbons v. State, 634 P.2d 1214, 1216 (Nev. 1981).

28 <sup>4</sup>Page numbers in parentheses refer to the Court’s computer images of the documents.

1 indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines v. Weber,  
2 544 U.S. 269, 278 (2005).

3 IT IS THEREFORE ORDERED that Respondents’ Motion to Dismiss (#16) is **GRANTED**  
4 in part.

5 IT IS FURTHER ORDERED that Petitioner shall have thirty (30) days from the date of  
6 entry of this Order to do one of the following: (1) inform this Court in a sworn declaration that he  
7 wishes to dismiss Grounds 2(2), 3, 4, 5, and 7 of his Petition (#6), and proceed only on the  
8 remaining grounds for relief, (2) inform this Court in a sworn declaration that he wishes to dismiss  
9 his Petition (#6) to return to state court to exhaust his state remedies with respect to the claims set  
10 out in Grounds 2(2), 3, 4, 5, and 7 of his Petition (#6), or (3) move to stay this action while he  
11 returns to state court to exhaust his state remedies with respect to the claims set out in Grounds 2(2),  
12 3, 4, 5, and 7 of his Petition (#6). Failure to comply will result in the dismissal of this action.

13 IT IS FURTHER ORDERED that if Petitioner elects to dismiss the aforementioned grounds  
14 of his Petition (#6) and proceed on the remaining grounds, Respondents shall file and serve an  
15 answer or other response to the remaining grounds within forty-five (45) days after Petitioner serves  
16 his declaration dismissing those grounds. If Respondents file and serve an answer, it shall comply  
17 with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.

18 IT IS FURTHER ORDERED that if Respondents file and serve an answer, Petitioner shall  
19 have forty-five (45) days from the date on which the answer is served to file and serve a reply.

20 DATED this 2<sup>nd</sup> day of March, 2009.



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24 LARRY R. HICKS  
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26 UNITED STATES DISTRICT JUDGE  
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